UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

COMMONWEALTH OF PUERTO RICO, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil No. 06-1305 (JAF) Consolidated With: Civil No. 06-1306 (JAF) Related To: Misc. No. 06-049 (JAF)

OPINION AND ORDER

I.

Background

Plaintiff, the Commonwealth of Puerto Rico, brings this action against the following Defendants: (1) the United States of America; (2) Alberto R. Gonzales, in his official capacity as the United States Attorney General; (3) Robert Mueller, in his official capacity as the Director of the Federal Bureau of Investigations (FBI); (4) Rosa Emilia Rodríguez-Vélez, in her capacity as the United States Attorney for the District of Puerto Rico;[1] and (5) Luis S. Fraticelli, in his official capacity as Special Agent in Charge of the FBI in Puerto Rico, asking this court: (a) to declare Defendants' refusal to disclose Department of Justice (DOJ) agency records pertaining to two

[1]Humberto S. García originally appeared in the caption of this case, and will be referred to throughout, as the United States Attorney for the District of Puerto Rico. He retired, however, and has been succeeded by Rodríguez.

controversial FBI operations as violative of the housekeeping statute, 5 U.S.C. § 301 (1996 & Supp. 2006), regulations promulgated by DOJ pursuant to the housekeeping statute, 28 C.F.R. §§ 16.21-16.29, and its sovereign right to pass and enforce criminal laws as established in the United States Constitution; and (b) to permanently enjoin Defendants from withholding any information that Plaintiff requests pertaining to two FBI operations. Docket Document No. 1; Civ. No. 06-1306, Docket Document No. 1. Defendants move to dismiss Plaintiff's complaint, arguing that Plaintiff fails to state claims upon which relief can be granted because the federal government has properly invoked a privilege recognized by the housekeeping statute and related DOJ regulations that protect agency records from disclosure when their release would reveal sensitive law enforcement investigative techniques. Docket Document Nos. 23, 25. Plaintiff opposes Defendants' motion, Docket Document No. 29, and moves for summary judgment in its favor. Docket Document No. 30. Defendants oppose Plaintiff's summary judgment motion, Docket Document No. 32, and reply to Plaintiff's opposition to their motion to dismiss. Docket Document No. 35.

Plaintiff's complaint is divided into five causes of action. Docket Document No. 1; Civ. No. 06-1306, Docket Document No. 1. We grant Defendants' motion to dismiss as to Plaintiff's first four causes of action which, inter alia, challenge the constitutionality of the housekeeping statute and related DOJ regulations, question

whether these laws recognize the law enforcement investigative technique privilege at all, and suggest that it is entitled to non-statutory judicial review of Defendants' decision to invoke the investigative techniques privilege. Docket Document No. 1; Civ. No. 06-1306, Docket Document No. 1; See, infra, sections IV.A, IV.B, IV.C. As to Plaintiff's fifth and final cause of action, which asks for judicial review of whether Defendants have correctly invoked the investigative techniques privilege to protect the records requested in this case under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. (1996 & Supp. 2006), we also dismiss this, granting summary judgment in Defendants' favor. Docket Document No. 1; Civ. No. 06-1306, Docket Document No. 1, See, infra, section IV.D.

II.

Factual and Procedural Synopsis

This case concerns two information requests Plaintiff made of the federal government, and Defendants' refusal to disclose all of the requested records. This factual summary is derived from the case records pertaining to two complaints filed by Plaintiff on March 23, 2006, one for each of the denied information requests. Docket Document Nos. 1, 11, 23, 25, 26, 29, 30, 35, 37, 38. Though these two complaints were originally assigned individual case numbers, they were consolidated under Civ. No. 06-1305 on March 24, 2006, because they presented near-identical legal issues. Civ. No. 06-1306, Docket Document No. 7.

A. Ojeda Information Requests

We gather the following factual background from papers and documents on file, as well as from the DOJ's Inspector General's Report on the Ojeda raid. See U.S. DOJ, Office of the Inspector General, A Review of the September 2005 Shooting Incident Involving the FBI and Filiberto Ojeda Ríos, August. 6, 2006, Available at: http://www.usdoj.gov/oig/special/s0608/full_report.pdf. The parties have referred to this document in their filings. Docket Document Nos. 37, 38. By making this statement of facts we do not claim that these facts are beyond controversy or that they have been definitively established.

Filiberto Ojeda-Ríos helped found the Macheteros, an organization that seeks to gain Puerto Rico's independence by armed struggle against the United States government, in the mid-1970s. In the years that followed, the Macheteros claimed responsibility for various murders and bombings around the island, and have conducted robberies to finance their activities. One such robbery occurred on September 12, 1983, when the Macheteros stole $7.1 Million from a Wells Fargo facility in West Hartford, Connecticut; the theft was one of the largest bank robberies in U.S. history.

On August 30, 1985, while executing a warrant to arrest Ojeda in Puerto Rico, FBI agents received no response when they announced themselves at Ojeda's residence. Once the agents entered, however, Ojeda opened fire and shot one of the federal agents in the face,

permanently blinding him in one eye. After a standoff, Ojeda was subdued by agents. Ojeda was first put on trial in Puerto Rico for assaulting the FBI agents during the arrest, and was acquitted. While out on bond pending final disposition and sentence in Connecticut for the bank robbery, Ojeda cut off his electronic monitoring device and skipped bail. Ojeda was sentenced for the bank robbery charge in Connecticut in 1992 in absentia.

Nearly fifteen years later, FBI intelligence revealed that Ojeda was living in Hormigueros, Puerto Rico, and the agency began an operation on or around September 23, 2006, to apprehend him. In the course of the FBI's raid of his estate, Ojeda opened fire and shot an agent in his abdomen. Another agent was also shot, but ultimately escaped injury because of his bullet-proof vest. Ojeda himself was shot. On orders from superiors in Washington, D.C., however, FBI agents did not enter the Ojeda residence until the next day, by which time Ojeda had died from his injury.

Puerto Rico DOJ ("PRDOJ") almost immediately began an investigation into the Ojeda raid, and to that end, on October 4, 2005, Defendant Fraticelli was served with a subpoena for the production of related information and objects. Michael Faries, Chief Division Counsel with the FBI in Puerto Rico, responded by letter to Pedro G. Goyco-Amador, Prosecutor General of the Commonwealth, on October 5, 2005, reminding him that DOJ regulations, 28 C.F.R. §§ 16.21-16.29, laid out specific requirements and procedures for

requesting agency records. This regulatory framework, according to Faries, required Goyco to "furnish an affidavit or statement to the United States Attorney's Office, District of Puerto Rico," setting forth a summary of "the particular documents or testimony requested and their relevance to the proceedings" for which they are needed.

On October 7, 2005, Puerto Rico Attorney General Roberto J. Sánchez-Ramos sent the necessary affidavit to United States Attorney Humberto S. García in order to complete the Commonwealth's information request. In all, PRDOJ requested that the FBI produce twenty-three categories of information and materials. Among the items the PRDOJ demanded were: (1) a copy of the "Operation Order" relating to the FBI raid on Ojeda's residence; (2) the name, rank, division, address, and telephone number of every person who participated in, knew of, or took any decision regarding the operation; (3) nearly all equipment, vehicles, and weapons involved in the raid; (4) information gathered during the FBI's occupation of Ojeda's property; (5) copies of expert reports, photographs, video and audio recordings relating to the FBI's raid; and (6) general protocols for violent and arrest interventions.

On October 17, 2005, García responded by letter to Sánchez that the FBI would not surrender any of the information, objects, and documents sought by the subpoenas, noting that DOJ regulations precluded disclosure when it "would reveal investigatory records compiled for law enforcement purposes, and would interfere with

enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." 28 C.F.R. § 16.26(b)(5) This, García wrote, was a "final agency decision which may be reviewed by the United States District Court."

In subsequent communications between García and Sánchez, however, García urged Sánchez not to worry that the FBI's decision necessarily rendered the requested objects and information undiscloseable in perpetuity. There were some items, for instance, García wrote in an October 21, 2005, letter to Sánchez, that could possibly be released "once [an investigation by the DOJ Office of the Inspector General] as well as other investigations are completed."

In response to the FBI's refusal to immediately produce information and objects, PRDOJ threatened judicial action in a letter dated November 2, 2005.

García wrote Sánchez again on November 9, 2005, indicating his frustration with PRDOJ's impatience. In that letter, though, García consented to permit PRDOJ access to examine certain items listed in its subpoena, including: (1) the bullet proof vests and helmets damaged during the intervention; (2) the weapons fired in the intervention; (3) the vehicle used to enter Ojeda's residence; and (4) the photographs taken before, during, and after the intervention. García conditioned Plaintiff's access to these items, however, on an FBI official's presence during inspection. García further insisted that the FBI would at all times retain official custody of the items

and PRDOJ would have to share its conclusions with the Office of the Inspector General (OIG). As to the remaining items listed in the subpoena, García insisted that they remained undiscloseable. In the event that his attempts to compromise were insufficient, García reminded Plaintiff that the APA provided an opportunity for judicial review of the agency's decision.

Plaintiff accepted García's invitation to examine the vests, helmets, weapons, vehicle, and photographs. On January 20, 2006, however, Plaintiff issued another angry letter to García requesting that he produce additional agency records – contact information for "those individuals who can shed the most light into the chronology and nature of the events that transpired on the field during the intervention with Mr. Ojeda Ríos, as well as regarding the key decisions concerning the manner and conduct of said intervention" – within one week, by January 27, 2006. On January 26, 2006, García sent Plaintiff a letter refusing this demand, referencing the agency's earlier and oft-repeated invocations of 28 C.F.R. § 16.26(b)(5).

Plaintiff filed a lawsuit in this court on March 23, 2006, seeking declaratory and injunctive relief from Defendants' refusal to release the requested records. Civ. No. 06-1305, Docket Document No. 1.

B. 444 De Diego Information Requests

In the aftermath of the Ojeda raid, FBI agents retrieved information from his residence which was, in turn, used by the agency to help establish the probable cause necessary to obtain additional search warrants relating to their investigation of several specific criminal activities being planned by the Macheteros. As FBI agents executed one of these search warrants at a residential condominium located at 444 de Diego, in the Río Piedras area of San Juan, Puerto Rico, on February 10, 2006, a large group of protesters, reporters, and curious members of the general public clustered outside. Apparently, some of these citizens are claimed to have breached an established police line despite FBI agents' orders to the contrary. Eventually, an FBI agent used pepper spray to drive the surging public back behind what they understood was the police line.

Plaintiff began an investigation into these events, issuing subpoenas on February 17, 2006, against García and Fraticelli for the production of certain information, documents, and objects pertaining to the FBI's search of 444 de Diego. The subpoenas, which preemptively included an affidavit similar to the one required in the context of the Ojeda information request summarizing the documents requested and their relevance to the proceedings, ordered production of the requested materials by February 28, 2006. The three categories of requested materials were: (1) the name, rank, division, address, and telephone number of two FBI agents who allegedly used pepper spray and whose photos were attached to the subpoena; (2) official

photographs of these two FBI agents; and (3) internal FBI protocols relating to the use of force and pepper spray.

Facing possible criminal contempt charges for failing to respond, García and Fraticelli filed a motion in this court to quash the subpoenas on February 28, 2006. Misc. No. 06-49, Docket Document No. 1. Plaintiff sent a letter to United States Attorney General Alberto Gonzales on March 1, 2006, asking for his help in getting the FBI to respond to the subpoenas. Plaintiff opposed García and Fraticelli's motion to quash the subpoenas on March 2, 2006. Misc. No. 06-49, Docket Document No. 3. We convened a hearing that same day, during which the federal government's lawyers reminded Plaintiff that it had to follow DOJ regulations, which meant pursuing an agency decision through the proper regulatory framework set forth in 28 C.F.R. §§ 16.21-16.29, in order to properly requisition the records at issue. Misc. No. 06-49, Docket Document No. 2. Plaintiff indicated that it was evaluating other avenues to get information about the 444 de Diego search, and that it had no serious intention of enforcing the challenged subpoenas at that time. Misc. No. 06-49, Memorandum Order, Docket Document No. 4. Given this court's view that Plaintiff had "effectively mooted" the issue before it by disavowing an intent to enforce the subpoenas, we declined to rule on Plaintiff's motion to quash. Id.[2]

[2]Much has been made by observers of the court process about the fact that our Memorandum Order of March 2, 2006, Misc. No. 06-049, Docket Document No. 4, made factual findings without receiving

The next step Plaintiff took with respect to the 444 de Diego information request was to file the instant lawsuit on March 23, 2006, seeking declaratory and injunctive relief from Defendants' failure to release the requested records. Docket Document No. 1.

C. Cases Reassigned, Consolidated

Plaintiff's complaint seeking Ojeda raid information was originally assigned to Judge Domínguez. Observing that it implicated many of the same legal issues as Misc. No. 06-49, an action over which the undersigned had retained jurisdiction, Judge Domínguez reassigned the case to the undersigned on March 24, 2006. Docket Document No. 3. That same day, and in recognition of the fact that Plaintiff's complaint seeking Ojeda raid information implicated the same legal issues as Plaintiff's complaint seeking 444 de Diego information, the undersigned consolidated those two actions into one. Docket Document No. 6.

Defendants moved to dismiss this case in its entirety on May 23, 2006. Docket Document Nos. 23, 25. Plaintiff opposed the motion on June 7, 2006, Docket Document No. 29, and filed a motion for summary judgment that same day. Docket Document No. 30. Defendants opposed Plaintiff's summary judgment motion on June 20, 2006, Docket Document

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evidence. However, it is evident that that is not the case. Our factual narrative, like that in the present case, is open to precise substantiation if and when any of these controversies reach a trial on the merits. Ascribing any purpose to those narratives other than a simple informative background is totally misplaced.

No. 32, and replied to Plaintiff's opposition to their motion to dismiss on June 28, 2006. Docket Document No. 35.

III.

Standards

A. Motion to Dismiss Standard

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an action against him based solely on the pleadings for the plaintiff's "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In assessing a motion to dismiss, "we accept as true the factual averments of the complaint and draw all reasonable inferences therefrom in the plaintiffs' favor." Educadores Puertorriqueños en Acción v. Hernández, 367 F.3d 61, 62 (1st Cir. 2004) (citing LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998)); see also Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 971 (1st Cir. 1993). We then determine whether the plaintiff has stated a claim under which relief can be granted.

We note that a plaintiff must only satisfy the simple pleading requirements of Federal Rule of Civil Procedure 8(a) in order to survive a motion to dismiss. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Morales-Villalobos v. García-Llorens, 316 F.3d 51, 52-53 (1st Cir. 2003); DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55-56 (1st Cir. 1999). A plaintiff need only set forth "a short and plain statement of the claim showing that the pleader is

entitled to relief," FED.R.CIV.P. 8(a)(2), and need only give the respondent fair notice of the nature of the claim and petitioner's basis for it. Swierkiewicz, 534 U.S. at 512-515. "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Id. at 514 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

B. Summary Judgment Standard

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

The moving party carries the burden of establishing that there is no genuine issue as to any material fact, though the burden "may be discharged by 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

The burden has two components: (1) an initial burden of production that shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion that always remains on the moving party. Id. at 331.

The non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment exists "to pierce the boilerplate of the pleadings and assess the proof in order to determine the need for trial." Euromodas, Inc. v. Zanella, 368 F.3d 11, 17 (1st Cir. 2004) (citing Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992)).

IV.

Legal Analysis

Defendants have refused to produce the documents Plaintiff requested pursuant to the housekeeping statute and the DOJ's Touhy regulations. Plaintiff's complaint challenging Defendants' decision alleges five causes of action, Docket Document No. 1, and we shall analyze each of these in turn.

A. Do the Housekeeping Statute or the Touhy Regulations Create a Substantive Privilege to Protect DOJ Information?

Plaintiff's first and second causes of action claim entitlement to declaratory and injunctive relief ordering Defendants to produce all requested information, objects, and documents ("information").

First, Plaintiff argues that the housekeeping statute, 5 U.S.C. § 301, does not create or authorize DOJ to create through regulations, any independent privileges that could preclude disclosure of agency records. Docket Document No. 1. Alternatively, Plaintiff argues that, even if it were legitimate for Defendants to invoke such a privilege to protect agency records generally, the DOJ's Touhy regulations, 28 C.F.R. §§ 16.21-16.29, explicitly bar Defendants from applying the privilege to a request for DOJ records made by Commonwealth law enforcement officials. Id.

According to the Supreme Court, housekeeping statutes have enjoyed a "long and relatively uncontroversial history" of "grant[ing] authority to the agency to regulate its own affairs." Chrysler Corp. v. Brown, 441 U.S. 281, 309 (1979). Indeed, their roots "go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority to govern internal department affairs." Id.; see also Act of July 27, 1789, ch.4 1 Stat. 29 (Department of Foreign Affairs); Act of August. 7, 1789, ch. 7, 1 Stat. 50 (Department of War)("[T]he Secretary for the department. . . shall. . . be entitled to have the custody and charge of all records, books and papers. . .). The modern-day housekeeping statute – the statute at issue in this case – was last amended in 1958, and provides that:

> [t]he head of an Executive department. . . may prescribe regulations for the government of his department, the conduct of his employees, the distribution and performance of its business,

> and the custody, use, and preservation of its records, papers, and property. . . .

5 U.S.C. § 301.

The DOJ, in accordance with its authority to manage its own records, has promulgated regulations outlining the procedure that must be followed when the agency or one of its employees receives a subpoena for the "production or disclosure" of DOJ records. 28 C.F.R. § 16.21(a)("This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department. . . [i]n all federal and state proceedings in which the United States is not a party. . . when a subpoena. . . is issued for such material. . ."). The DOJ regulations are commonly known as Touhy regulations after the 1951 Supreme Court case with the same name. In that case, United States ex rel. v. Touhy, a habeas petitioner subpoenaed FBI records pertaining to his conviction. 340 U.S. 462, 463-64 (1951). The Attorney General, acting pursuant to agency regulations placing such decision-making in his hands ("Touhy regulations"), ordered his subordinates not to respond to the subpoena. Id. at 464. The Supreme Court held that an FBI agent refusing to answer a subpoena under such circumstances could not be found guilty of contempt. Id. at 468. According to the Court, the Attorney General, as the centralized DOJ decision-maker for such information demands, could "validly withdraw from his subordinates the power to release department papers." Id. at 467.

The Touhy Court further commented on the wisdom of regulations placing such agency determinations in the hands of one single person: "When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether a subpoena duces tecum will be willingly obeyed or challenged is obvious." Id. at 468.

The DOJ's Touhy regulations hold that no agency employee "shall, in response to a demand, produce any material contained in the files of the Department." 28 C.F.R. § 16.22(a). Instead, the employee "shall immediately notify the U.S. Attorney for the district where the issuing authority is located." 28 C.F.R. § 16.22(b). When the subpoena seeks information other than oral testimony, the responding U.S. Attorney, in turn, "shall request a summary of the information sought and its relevance to the proceeding." 28 C.F.R. § 16.22(c).

The responding U.S. Attorney must then determine whether to release the requested records and may be required to collaborate in this regard with the custodian of the records at issue. 28 C.F.R. §§ 16.24(a), (b)(1), (d)(1), (f). Among the factors the U.S. Attorney must consider in deciding whether to make disclosures pursuant to a request is "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. § 16.26(a)(2). The Touhy regulations further explain that "[a]mong the demands in

response to which disclosure will not be made are those demands with respect to which . . . [d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." 28 C.F.R. § 16.26(b)(5). Plaintiff argues that Touhy's mention of this investigative technique privilege is improper, and that by extension, Defendants' invocation of the investigative technique privilege to protect DOJ records is, therefore, also improper. Docket Document Nos. 1, 11, 29.

Plaintiff is correct insofar as it means to say that DOJ Touhy regulations do not themselves create privileges to protect information. In fact, in 1958, Congress amended 5 U.S.C. § 301 to explicitly emphasize that nothing in the statute itself, and, therefore, nothing in the Touhy regulations promulgated thereunder, may "authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301; See also Chrysler Corp. v. Brown, 441 U.S. 281, 310(1979)(emphasizing that § 301 "is a 'housekeeping statute,' authorizing rules of agency organization, procedure, or practice, as opposed to 'substantive rules'"); Kwan Fai Mak v. FBI, 252 F.3d 1089, 1092 (9th Cir. 2001)("[T]he regulations do not create an independent privilege authorizing the Department of Justice to withhold information. Nor could they, because the statutory authority for them, 5 U.S.C. § 301,

makes clear [that they may not].")(quotations omitted); Exxon Shipping Co. v. United States, 34 F.3d 774, 776 (9th Cir. 1994)("Section 301 does not, by its own force, authorize federal agency heads to withhold evidence sought under a valid federal subpoena.").

However, even though the housekeeping statute and the Touhy regulations do not themselves create substantive privileges, the federal government can invoke substantive privileges existing independently of those laws to protect information demanded through the Touhy process. See United States ex rel. Touhy v. Ragen, 340 U.S. 462, 473 (1951)(J. Frankfurter, concurring)(noting, even though the issue was not before the Court, that "[i]t will of course be open to [the Attorney General] to raise those issues of privilege from testimonial compulsion"); Exxon Shipping Co., 34 F.3d at 780 (recognizing that the federal government is "free to raise any possible claims of privilege from testimonial compulsion that may rightly be available to it"). As discussed, the DOJ's Touhy regulations permit the U.S. Attorney to consider "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege," 28 C.F.R. § 16.26(a)(2), and specifically mention that certain records may be sensitive because their disclosure may "interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." 28 C.F.R. § 16.26(b)(5). The mention of

substantive privilege in the Touhy regulations, then, does not constitute regulatory creation of those substantive privileges, but rather regulatory recognition of their existence. We must, therefore, dismiss Plaintiff's claim that they are entitled to declaratory and injunctive relief in this case because of Plaintiff's belief that the housekeeping statute and the DOJ's Touhy regulations impermissibly create a privilege for Defendants to invoke to protect the requested records from disclosure.

Plaintiff alternatively argues that even if we find that privileges exist to protect agency records requested through the Touhy process generally, Touhy regulations explicitly bar Defendants from invoking such privileges against information requests made by Commonwealth of Puerto Rico law enforcement. In support of this argument, Plaintiff cites a DOJ Touhy regulation that reads: "Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prospective, or regulatory agencies." 28 C.F.R. 16.21(c).

There is a dearth of case law interpreting 28 C.F.R. § 16.21(c). It appears, however, that Plaintiff fails to state a claim for declaratory or injunctive relief thereunder because § 16.21(c)'s plain language does not establish what Plaintiff purports it does, i.e., a categorical rule that the DOJ can never withhold information from a state law enforcement agency. Section 16.21(c) states that

the DOJ's Touhy regulations are not meant to impede the "appropriate disclosure" of agency records requested by federal, state, local, or foreign law enforcement agencies. If § 16.21(c)'s use of the word "appropriate" is to have any meaning – and we think that it must – then there must be instances where the DOJ's information disclosure to a fellow law enforcement agency would be appropriate as well as instances where the DOJ's information disclosure to a fellow law enforcement agency would be inappropriate. Thus, we find that Plaintiff has failed to establish valid claims for either of its first two causes of action.

B. Does the Invocation of Privilege Under the Housekeeping Statute or the Touhy Regulations Unconstitutionally Abrogate Plaintiff's Sovereign Right to Enforce its Criminal Laws?

Plaintiff's third cause of action alleges that Defendants' invocation of a substantive privilege to protect its records from disclosure constitutes an unconstitutional abrogation of Puerto Rico's sovereign right to enforce its criminal law. Docket Document No. 1. It is well established that "[f]oremost among the prerogatives of [State] sovereignty is the power to create and enforce a criminal code." Heath v. Alabama, 474 U.S. 82, 93 (1985). This authority even extends to federal agents who have committed criminal acts in circumstances where they are not protected by qualified immunity. See United States ex rel. Drury v. Lewis, 200 U.S. 1, 7 (1906)(holding that state could prosecute soldiers for murder when they allegedly unlawfully shot a suspect after he had

surrendered); but c.f. Cunningham v. Neagle, 135 U.S. 1 (1890) (holding that a federal law enforcement agent enjoys Supremacy Clause immunity from state criminal prosecution when his violation of state law arises from reasonable execution of his official duties). There is, therefore, no question that Plaintiff is within its rights to criminally investigate a federal agent that it reasonably suspects may have committed a crime while acting outside the scope of his or her official duties. The subpoenas at issue in this case are allegedly incident to such an investigation, and we have no doubt that Defendants' refusal to comply with the subpoenas makes that investigation more complicated.

Citing this complication, Plaintiff argues that Defendants' refusal to produce the requested documents in this case, made pursuant to the housekeeping statute and the Touhy regulations, unconstitutionally infringes upon Plaintiff's sovereign right to enforce its criminal laws. In support of its position, Plaintiff cites case law evincing two strands of Supreme Court doctrine regarding the balance of federal and state sovereignty. Docket Document No. 11, 29. The Court's holding in United States v. Morrison, for instance, supports a check on Congress when it attempts to claim powers specifically denied to it by the framers, such as a general police power superceding that of the states. 529 U.S. 598 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local."). The Court's holding in

New York v. United States, on the other hand, delimits the federal government's ability to forcibly commandeer state resources to achieve federal aims. 505 U.S. 144 (1992).

In Morrison, the Supreme Court invalidated a provision of the federal Violence Against Women Act (VAWA) establishing a civil remedy for victims of gender-motivated violence. 529 U.S. 598 (2000). Observing how attenuated gender-motivated violence's impact is on interstate commerce, the Court concluded that the VAWA provision is not a justifiable exercise of Congress' legislative authority under the Commerce Clause. Id. at 614-19. To rule otherwise, according to the Court, would be "to obliterate the Constitution's distinction between national and local authority." Id. at 615. The housekeeping statute and the Touhy regulations, however, do not present the same risk. Instead, they set forth a procedural framework by which the federal government responds to information demands submitted to it by any interested party. We recognize that the federal government's claim of privilege in this case is frustrating for Plaintiff, but we simply do not see how it unconstitutionally intrudes upon Plaintiff's sovereign right to conduct criminal investigations. To be sure, it may make Plaintiff's criminal investigation more difficult than it might otherwise be, but the same may be said of other testimonial privileges recognized by the law.

Plaintiff also cites to New York v. United States, a case in which the Supreme Court invalidated a federal law requiring the

states to either regulate their radioactive waste disposal or take title to it. 505 U.S. 144 (1992). Based on an analysis of the federalist principles embodied in Article I and the Tenth Amendment of the United States Constitution, the Court held that it was unconstitutional for the federal government to compel states to adopt legislative programs in order to further federal interests. Id. at 167-68 (explaining alternative, constitutional ways the federal government could achieve the same ends, e.g., by conditioning the receipt of federal funds on a state's willingness to craft desired regulations). "[T]he Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." Id. at 176 (internal citations omitted). Taking the Court's holding into account, we fail to see, and Plaintiff fails to explain, how it applies to Defendants' refusal to release the requested information. It is unclear how Defendants' decision could run afoul of the Constitution when it does not compel Plaintiff to do anything at all.

Having concluded that Defendants' decision not to disclose agency records does not implicate Puerto Rico's sovereign right to enforce its criminal laws under the United States Constitution, we dismiss Plaintiff's third cause of action.

C. Does the APA Govern the Judicial Review of Defendants' Decision Not to Release the Records Requested by Plaintiff?

We must next consider whether the APA governs judicial review of Defendants' decision not to release its records. Plaintiff argues in its fourth cause of action that we should conduct non-statutory judicial review of Defendant's decision, and that the APA can apply only as an absolutely last resort. Docket Document No. 1. According to Defendants, however, their decision is subject to review only under the APA. Docket Document No. 23.

It was established, even before the APA was passed, that sovereign immunity does not bar suits seeking non-statutory judicial review for non-monetary, specific relief against federal government officials where the officials' challenged actions are alleged to be unconstitutional or beyond their statutory authority. Clark v. Library of Congress, 750 F.2d 89, 102 (D.C. Cir. 1984)(listing cases); see also Chamber of Commerce v. Reich,74 F.3d 1322, 1327 (D.C. Cir. 1996)(if a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action). Plaintiff presumably prefers non-statutory judicial review based on the hope that it might offer more liberal procedural requirements than the APA, and perhaps a more liberal judicial review standard. To proceed with an APA action in this case, for instance, Plaintiff would have to show that DOJ made a final agency decision with respect to its information requests. 5 U.S.C. § 704 ("Every agency action made reviewable by statute and every final agency

action. . . shall be subject to judicial review."). Defendants do, in fact, contest whether Plaintiff has obtained such a final agency decision with respect to one of the information requests at issue in this case. Docket Document No. 29; see infra, section IV.D. Moreover, a successful APA action would hinge on whether DOJ's refusal to disclose the requested records was an "arbitrary and capricious" decision in light of housekeeping statute and Touhy regulation standards. 5 U.S.C. § 706(2)(A); see infra, section IV.D. This "arbitrary and capricious" judicial review standard is extremely deferential to the agency.

In support of its suggestion that judicial review of Defendants' decision to withhold records is not governed by the APA, Plaintiff refers us to Leedom v. Kyne, a Supreme Court case holding that a United States District Court had general jurisdiction to hear a lawsuit against the National Labor Relations Board for placing professional employees into a bargaining group with non-professional employees in clear violation of federal law, even though the NLRB's action was not eligible for any statutory judicial review. 358 U.S. 184, 190 (1958). If no judicial review were available under federal courts' general jurisdiction when the federal government acted to deprive rights in excess of its delegated powers, the Court reasoned, laws passed by Congress would be unenforceable and robbed of their vitality. Id.

Plaintiff also invokes a similar ruling by the First Circuit in Rhode Island Department of Environmental Management v. United States to further justify its position that its claim need not be under the APA and that it may proceed under the court's equitable powers and in the general federal jurisdiction of 28 U.S.C. § 1331. 304 F.3d 31 (1st Cir. 2002). In that case, a Rhode Island state agency that had been haled before a federal administrative law judge (ALJ) argued that sovereign immunity protected it from defending itself in that federal forum. Id. at 39 n. 2. After the ALJ rejected the sovereign immunity argument, the state agency filed a federal lawsuit seeking judicial review, and the district court ruled in the state's favor. Id. at 36.

The First Circuit, while holding that the ALJ had never made a "final agency decision" reviewable by the district court under the APA, endorsed the district court's non-statutory judicial review of the ALJ's determination anyway, noting that the question of whether the state was protected by sovereign immunity would have otherwise remained ineligible for judicial review until after the ALJ entered a final decision in the administrative dispute, that is to say, until well after the state's sovereign interest in "prevent[ing] the indignity of [being] subject[ed]. . . to the coercive process of judicial tribunals" had already been compromised. Id. at 41 (internal quotations and citations omitted).

While Leedom and Rhode Island indeed present peculiar instances where non-statutory judicial review of agency action was permitted, they do not stand for the proposition that a United States District Court is authorized to allow non-statutory review whenever a party requests it. Rather, non-statutory judicial review of the kind seen in Leedom and Rhode Island is only available within "painstakingly delineated procedural boundaries." See Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964). Furthermore, the Supreme Court has set forth the factors that must be present to invoke non-statutory review. Rhode Island, 304 F.3d at 42-43. One factor that must be present is a showing that the denial of judicial review of a non-final agency decision would "wholly deprive the [party] of a meaningful and adequate means of vindicating its rights." Bd. Of Governors of Fed. Reserve System v. Mcorp Fin. Inc., 502 U.S. 32, 43 (1991). It is this factor that was central to the Supreme Court's decision in Leedom, where the professional employees had no other recourse through which to obtain judicial review, and central to the First Circuit's decision in Rhode Island, where the state's sovereign immunity would not survive intact if it had been forced to wait to seek judicial intervention until the federal administrative proceeding had already run its course against it.

By contrast, there is no indication that denial of non-statutory review of Defendants' decision to withhold would deprive Plaintiff of a meaningful and adequate means of vindicating its rights. It is

very clear Plaintiff has a means of vindicating its rights: Through the APA. Kwan Fai Mak v. FBI, 252 F.3d 1089, 1091 n.5 (9th Cir. 2001)("[T]he proper procedure for the party seeking to compel disclosure in such circumstances is to file a separate action in federal court under the APA."); COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 271 (4th Cir. 1999)("[W]hen the government is not a party to the underlying action, an agency's refusal to comply with a subpoena must be reviewed under the standards established for final agency actions by the [APA]. . ."); Smith v. Cromer, 159 F.3d 875, 881 (4th Cir. 1998)("[The] remedy, if any, for the Justice Department's [refusal to release information] in the instant case may be found in the [APA]. . ."); In re Elko County Grand Jury v. Siminoe, 109 F.3d 554, 557 n.1 (9th Cir. 1997)("The appropriate means for challenging [a federal agency's] decision under Touhy is an action under the Administrative Procedure Act in federal court."). The APA expressly provides Plaintiff with a meaningful and adequate opportunity for judicial review of Defendants' action.

In addition, we disagree with Plaintiff's final argument regarding the inapplicability of the APA to the present case. Plaintiff cites to a footnote in Exxon Shipping Co. v. United States Department of Interior, which states that, in some instances, "APA proceedings can be costly, time-consuming, inconvenient to litigants, and may effectively eviscerate any right to the requested testimony." 34 F.3d 774, 780 n.11 (9th Cir. 1994) (internal quotations omitted)

(citing to In re Recalcitrant Witness, 25 F.3d 761 (9th Cir. 1994)). This argument is misplaced. The Exxon Shipping Co. footnote contemplates the potential inadequacy of the APA only in a limited circumstance; namely, when a plaintiff's access to a government witness' testimony would be precluded if forced to wait for an APA action to ripen. This narrow exception to the general rule that the APA governs review of all agency action does not apply to the case at hand. We, therefore, dismiss Plaintiff's fourth cause of action requesting non-statutory judicial review of Defendants' decision not to release the agency records requested in this case.

D. Is Defendants' Decision Not to Release the Requested Records "Arbitrary and Capricious" Under the APA?

The Administrative Procedure Act, which was first passed in 1946, sets forth rules by which agencies exercising congressionally delegated executive, legislative, and judicial powers execute those functions. See Steven P. Croley, The Administrative Procedure Act and Regulatory Reform: A Reconciliation, 10 ADMIN. L.J. AM. U. 35, 36 (1996). It also grants individuals the right to judicial review of agency action. 5 U.S.C. § 702. The original text of § 702 of the APA, the provision granting individuals the right to judicial review of agency action, provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." S.Rep. No. 94-996, pp. 19-20

(1976)(S.Rep.). A 1976 amendment to that law added language stating that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States. . ." 5 U.S.C. § 702. (1996 & Supp. 2006). As amended, then, § 702 waives the federal government's sovereign immunity defense with regard to lawsuits seeking non-monetary relief for improper Federal administrative action. Clark v. Library of Congress, 750 F.2d 89, 102 (D.C. Cir. 1984); see also David A. Webster, Beyond Sovereign Immunity: 5 U.S.C. § 702 Spells Relief, 49 OHIO ST. L.J. 725, 726 (1988) (discussing how courts have interpreted what constitutes a "non-monetary relief" lawsuit under § 702).

The scope of judicial review for agency action is set forth by § 706 of the APA, which states that the reviewing court may reverse an agency's action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[3] 5 U.S.C.

[3]Even if we were to determine that Defendants arbitrarily or capriciously misapplied DOJ's Touhy regulations, however, we are not entirely sure that the APA empowers us to compel release of the requested information in the present case, for the Touhy regulations make clear that they "are intended only to provide guidance for the internal operations of the Department of Justice, and [are] not intended to, and [do] not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States." 28 C.F.R. § 16.21(d); Compare Smith v. Cromer, 159 F.3d 875, 880 (4th Cir. 1998)("It is. . . incorrect to conclude that the Justice Department regulations, if

§ 706(2)(A)(1996 & Supp. 2006). Judicial review is accordingly "severely limited," and courts are only free to determine whether the agency followed its own guidelines or committed a clear error of judgment." Davis Enter. v. EPA, 877 F.2d 1181, 1186 (3d Cir. 1989). We may not substitute our own judgment for that of an agency. Id. at 1186.

A plaintiff may not seek substantive judicial review of an agency's decision until the contested agency decision is "final." 5 U.S.C. § 704 ("Every agency action made reviewable by statute and every final agency action. . . shall be subject to judicial review."). The Supreme Court has held that an agency action is considered "final" only when the action signals the consummation of the agency's decisionmaking process and gives rise to legal consequences. See Bennett v. Spear, 520 U.S. 154, 156 (1997). Although Defendants concede that Plaintiff has secured a final decision with respect to its Ojeda information requests, Defendants argue that Plaintiff has not secured a final decision with respect to its 444 de Diego information request and, therefore, the Plaintiff's claim regarding the 444 de Diego request must be dismissed. Docket Document No. 23.

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properly 'complied' with, confer some entitlement on parties seeking the disclosure of agency records. The regulations do not purport to grant any right of access to applications."), with Kasi v. Angelone, 300 F.3d 487, 506 (4th Cir. 2002)(stating that a district court may, under the APA, "compel the law enforcement agency to produce the requested information in appropriate cases").

In fact, Plaintiff has not submitted anything into the record indicating that the government made a final decision on its demand with regard to its 444 de Diego requests. This is a bizarre procedural omission on Plaintiff's part, given that it was publicly advised during our March 2, 2006, hearing that it must follow the Touhy process in order to achieve a final agency decision. Misc. No. 06-49, Docket Document No. 7. Moreover, Plaintiff was obviously fully aware of this requirement from its experience making its Ojeda information requests. Rather than cure its procedural deficiencies, Plaintiff instead chose to simply file this lawsuit three weeks later demanding access to the 444 de Diego records. Thus, because Plaintiff has failed to secure a final decision regarding the 444 de Diego information requests, we cannot move to the substantive merits of the government's withholding.

Plaintiff tries to wave away the procedural shortcomings of its 444 de Diego information requests in its summary judgment motion by pointing to a letter it received from the FBI's General Counsel, Valerie Caproni, on April 7, 2006, stating that "all matters pertaining to [the 444 de Diego information request] will be resolved by the District Court. It is the opinion of this office that no further action should be taken by the FBI pending such resolution." Docket Document No. 30, Exh. 2. Plaintiff argues that this letter constitutes final agency action and that the substantive merits of Defendants' refusal to release 444 de Diego information is,

therefore, subject to judicial review under the APA. Plaintiff's invocation of Caproni's April 7, 2006, letter as a final agency decision reviewable under the APA is unacceptable, however, for Plaintiff filed its complaint against Defendants on March 23, 2006 – approximately two weeks before the Caproni letter was written. Ultimately, then, we find that Plaintiff's claim under the APA that the government improperly withheld the 444 de Diego information fails.

We now move to the last issue in this litigation, which is whether Defendants' decision to invoke the law enforcement investigatory techniques privilege against the disclosure of all requested Ojeda records was arbitrary.[4] Docket Document No. 25. Defendants claim that the investigatory techniques privilege is the basis for withholding all requested Ojeda records. Docket Document No. 25. As discussed, Defendants concede that their refusal to release the Ojeda records is a final agency decision, and reviewing courts may reverse final agency decisions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706.

[4]Defendants originally also invoked a privilege protecting law enforcement investigatory files from release when they could reveal sensitive information relating to an ongoing government investigation. Docket Document No. 25. On September 6, 2006, after the DOJ's Office of the Inspector General completed its investigation and issued an extensive report regarding the FBI operation to arrest Ojeda, Defendants indicated to this court that they would thereafter exclusively rely on the law enforcement privilege to protect the requested DOJ records from release. Docket Document No. 38.

The investigatory techniques privilege is "based primarily on the harm to law enforcement efforts which might arise from public disclosure of . . . investigatory files." United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1981)(discussing how the Deputy Attorney General may invoke the law enforcement privilege to protect DOJ records from release in the context of a Touhy demand)(citing Black v. Sheraton Corp., 564 F.2d 531 (D.C. Cir. 1977)).

Defendants assert that the release of the Ojeda records that Plaintiff requested "would [reveal], inter alia, how the FBI goes about capturing a fugitive who is believed to be dangerous, the number and types of personnel used by the FBI in such operations, the way the FBI collects evidence, the FBI's internal operating procedures in a variety of law enforcement settings, and the way in which law enforcement information is gathered." Docket Document No. 25. The records Plaintiff requested include the "operation order" relating to the attempt to apprehend Ojeda; detailed information about every person involved in the operation (including name, rank, and division); lists compiled during the operation; FBI organizational charts; and multiple internal protocols. It is easy to see from the nature of these records that they would reveal what Defendants claim they would reveal. We cannot, therefore, say that Defendants' strong interest in ensuring that such revealing information regarding sensitive investigative techniques remain confidential is arbitrary or capricious.

Pinpointing the government's strong interest in nondisclosure is only the first part of our review. The investigative techniques privilege is qualified in that the government's interest in nondisclosure must outweigh Plaintiff's need for access to the Ojeda information. Black v. Sheraton Corp. of America, 564 F.2d 531, 545 (D.C. Cir. 1977); United States v. Lilly, 185 F.R.D. 113, 115 (D. Mass 1999)(citing Cintolo, 818 F.2d at 1002). Plaintiff's interest in the Ojeda records stems from its need for evidence to conduct a local investigation into whether federal agents are subject to criminal prosecution for their actions during the September 28, 2006, FBI raid during which Ojeda was shot and killed. Docket Document No. 28. Defendants, however, aver that Plaintiff's interest in this regard has been greatly diluted by the fact that Plaintiff has presented no basis for believing that the incidents here fall into the rare class of cases where a state may prosecute a federal officer. Docket Document No. 32. Indeed, the DOJ's Office of the Inspector General has already conducted an extensive investigation into the federal agents' actions during the raid and published a 237-page report, available for public consumption, extensively detailing how the federal agents involved in the Ojeda raid acted within their authority and responsibility. See U.S. DOJ, Office of the Inspector General, A Review of the September 2005 Shooting Incident Involving the FBI and Filiberto Ojeda Ríos, August. 6, 2006, Available at: http://www.usdoj.gov/oig/special/s0608/full_report.pdf. We find that

Defendants have not made a "clear error in judgment" by invoking the investigatory techniques privilege. Davis, 877 F.2d at 1186. Given that an extensive governmental investigation has already taken place reviewing and ultimately certifying the propriety of the federal agents' actions during the raid,[5] we cannot say that Defendants have arbitrarily discounted Plaintiff's need to access the Ojeda records and conduct yet another investigation. Thus, we conclude that the government's interest in protecting its investigative techniques is paramount in this case. Indeed, the First Circuit has cautioned that where investigative techniques may be revealed, "the potential price to be paid by law enforcement is heavy, and should not be assessed without good reason." United States v. Cintolo, 818 F.2d 980, 1002 (1st Cir. 1987).

Moreover, we are certain that today's result reaches the correct decision not only because compelled disclosure of Defendants' Ojeda records is not required under the law, but also because Defendants have shown themselves to be extremely reasonable in negotiating with Plaintiff to grant it as much access to the requested information as possible without compromising the government's interest in protecting its sensitive investigative techniques. Defendants have, for instance, granted Plaintiff substantial access to some of the requested information – the bullet proof vests and helmets damaged

[5]Prompted in part by a request by Puerto Rico Governor Aníbal Acevedo Vilá. Docket Document No. 1, Exh. A.

during the intervention, the weapons fired in the intervention, the vehicle used to enter Ojeda's residence, and the photographs taken before, during, and after the intervention – so long as Plaintiff's agents did not assume physical custody of the information, and so long as federal agents were present with Plaintiff's agents as they studied the information. Civ. No. 06-1306, Docket Document No. 1, Exh. L. This, we think, shows that Defendants have not unthinkingly, unyieldingly, or arbitrarily rejected Plaintiff's request for the records at issue but, rather, have made a measured effort to share as much information as possible with a state law enforcement agency without compromising the effectiveness of their techniques.

Plaintiff complains that Defendants have waived the investigative technique privilege and are, therefore, foreclosed from invoking it to protect the Ojeda information for the first time in the context of this litigation. Docket Document No. 29. We need not delve too deeply into this allegation, for it is simply not true. The case record contains letters from García, which were submitted to this court as attachments to Plaintiff's own complaint, repeatedly invoking the investigative technique privilege relied upon by the government in this case. See Civ. No. 06-1306, Docket Document No. 1, Exhs. E, G.

Plaintiff also argues that the investigatory technique privilege only exists to protect government information from criminals who might frustrate future government surveillance. Docket Document

No. 29. Such concern, according to Plaintiff, is inapplicable in the present case given that it is a "sister law enforcement agency," and not a criminal. We think that Plaintiff's argument misapprehends that the investigative technique privilege does not only operate to prevent the release of sensitive agency records directly into the hands of a criminal, but also prevents any unrestricted dissemination of sensitive agency records to any person or entity in order to best protect the integrity and effectiveness of the agency's investigative practices. Indeed, Defendants have noted Puerto Rico officials' marked eagerness to talk to the press about the progress of its controversial information requests. Civ. No. 06-1306, Docket Document No. 1, Ex. K. Defendants' hesitance to release sensitive records to Plaintiff is therefore well-founded, and we certainly cannot find it arbitrary.

Given our determination that Defendants have validly claimed the investigative techniques privilege to protect the Ojeda records in this case, we must deny Plaintiff's motion for summary judgment in its favor and grant summary judgment for Defendants. Although Defendants have not moved for summary judgment, we find it appropriate to grant relief to a nonmovant. See Nat'l Expositions, Inc. v. Crowley Maritime Corp., 824 F.2d 131, 133 (1st Cir. 1987)("[A] district court has the legal power to render summary judgment . . . in favor of the party opposing a summary judgment motion even though he has made no formal cross-motion under rule

56."); 11 Moore's Federal Practice § 56.10[2][b] (Matthew Bender 3d ed.). Plaintiff's own position is that there is no genuine issue of material fact as to this issue, and Plaintiff had adequate opportunity to present related evidence in the context of its own summary judgment motion. With this dismissal of the balance of Plaintiff's fifth cause of action, no causes of action remain against the Defendants, and Plaintiff's complaint has been dismissed in its entirety.

V.

Conclusion

For the reasons stated herein, we **GRANT** Defendants' motion to dismiss as to Plaintiff's first four causes of action, **DENY** Plaintiff's summary judgment motion as to the fifth, and, instead **GRANT** summary judgment to Defendants regarding Plaintiff's fifth cause of action. Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of September, 2006.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U. S. District Judge